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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1146

CIA DE NAV. MAR. NETUMAR,

Petitioner,

against

JOAQUIM CONCEICAO, NEW JERSEY EXPORT MARINE CARPENTERS, INC., and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VICTOR S. CICHANOWICZ
Counsel for Petitioner
80 Broad Street
New York, New York 10004

JOHN P. SCHAFFER,
Of Counsel

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Statement

This supplemental and reply brief in support of the petition for a writ of certiorari is being filed to call the attention of this Court to a new case not available at the time of filing of the original petition, and is addressed to arguments first raised in the briefs in opposition.

I

The Court of Appeals for the Second Circuit has rendered a decision from which it is apparent that its decision in this case not only misinterprets the decisions of this

Court, but also is in direct conflict with the law on the warranty of seaworthiness as it has been defined and expanded over the last 25 years.

In *Bernardini* v. *Rederi A/B Saturnus* (decided March 11, 1975, 2 Cir. docket no. 74-1404) the Court said:

> "In *Conceicao,* the single act was the overloading of a storage bin that itself was sufficiently sturdy to bear a normal load . . . It is true that in *Conceicao* we went somewhat further than the Supreme Court did in *Usner,* for in *Usner* the single act of negligence was performed by a longshoreman and not by a member of the crew, while in *Conceicao,* the operative negligence was the fault of one of the ship's officers."

This Court was explicit in *Usner* v. *Luckenbach Overseas Corp.,* 400 U.S. 494 (1971) that its decision was restricted to a third party's single and wholly unforeseeable act of negligence and that no ship's crew member was in any way involved in the case (400 U.S. at page 500).

II

At page 3 of its brief Respondent International Terminal Operating Co., Inc. (International) states that "the longshoremen loaded the pipes in the locations where they were told to load them by the ship's officers."

At page 8 of its brief International further states:

> "Certainly a direction by a shipowner to a stevedore to load more pipes into a pipe bed than it would hold would actively hinder the stevedore in the performance of its work and prevent it from doing a workmanlike job."

Both New Jersey Export and International at pages 5 and 6 of their respective Briefs, state that Captain William Wheeler testified that the ship had an officer in overall supervision of the loading. However, neither are candid

with this Court that Captain Wheeler was not an eyewitness but was testifying merely as an expert.

At page A-12 Appendix to Petition (440 of 508 F.2d) the Court of Appeals however said:

> "There was no evidence from Piper or any other witness that he had given any information about the pipes, correct or incorrect, to the stevedore."

And at page A-12 (441) it further stated:

> "The loading of pipes in the starboard pipe bed was up to the top of the uprights or higher. And the necessary information for the proper conduct of the loading and stowage operation had not been given to those to whom the information was indispensable if they were to do a proper job. When these pieces of proof are put together, we think there was ample proof to justify a finding that the shipowner had failed to give this particular part of the loading and stowage operation the necessary supervision, * * *."

Someone obviously is not following the record. International overlooks the fact that it was its counsel who successfully prevented the carpentry foreman from giving testimony as to whether the pipe bed as constructed could hold pipe loaded above the uprights on the grounds that there was no such testimony in the case. With this, the trial judge agreed, and on the basis thereof sustained the objection.

At page 6 of its Brief International asserts that the charge of the trial court was "unassailable". Respondent Conceicao, on the other hand, does not dispute that the trial court did not charge the jury on overloading. While at page 4 of his Brief Respondent Conceicao takes exception to the concession which Petitioner asserts was made by his counsel on the argument of the appeal, he admits

that overloading was not argued in his summation to the jury and then dismisses the matter by asserting that the evidence was in the case. None of the respondents however can point to a word in the trial court's charge which could be construed as touching on the issue of overloading.

Atlantic and Gulf Stevedores Inc. v. *Ellerman Lines,* 369 U.S. 355 (1962) rehearing denied 369 U.S. 882 (1962), does not extend the protection of the Seventh Amendment to issues which are not submitted to a jury under a proper charge.

As a matter of fact, overloading never surfaced as an issue in the case until the case reached the Court of Appeals. (A1-A4 Appendix to Petition). On the trial Respondent Conceicao consistently maintained that his claims for recovery both under negligence and breach of warranty of seaworthiness were predicated on the fact that the pipe bed broke in normal use.

A trial is not a private controversy of no importance to the public. Fair trials are an interest of the state and it is the duty of court and counsel to see to it that every litigation is fairly and impartially conducted and that verdicts of juries are rendered only on the issues made by the pleadings and evidence. *New York Central Railroad Company* v. *Edward H. Johnson,* 279 U.S. 310, 318 (1929).

All of the respondents and the Court of Appeals, however, devote considerable attention to the testimony of Petitioner's Port Captain Piper, New Jersey Export's General Manager and Foreman William Montella, and the two experts White and Wheeler with respect to the construction of the pipe bed in question, the number of pipe beds which were ordered and the number actually built, the duties of the shipowner to inspect the pipe bed on the completion of construction and the quantity of pipe and where it was stowed, and urge that there is support in that testimony for a finding of negligence. They all overlook the

fact that in its charge the trial court instructed the jury that they could find the vessel unseaworthy if the pipe bed was not reasonably fit for its intended purpose, if the place of work was unsafe, or if the method used for the stowage of cargo was not suited for safe operations, and the jury found that the vessel was not unseaworthy. Since the shipowner therefore had not breached its absolute duty in any of these respects, what it did or did not do, or what should have been done, is of no consequence. Conduct which does not result in a condition which renders the vessel unseaworthy, hardly supports a finding of negligence.

This is not one of those cases to which the late Mr. Justice Frankfurter had reference in his concurring opinion in *Pope & Talbot Inc.* v. *Hawn,* 346 U.S. 406, 418 (1953) when he said:

> "Since unseaworthiness affords longshoremen recovery without fault and has been broadly construed by the courts, e.g., *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96, 88 L. ed. 561, 64 S.Ct. 455, note 2, supra, it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness."

It is therefore absurd to say that the shipowner was negligent in not supervising a method of stowing cargo which was safe, permitting too much pipe to be loaded into a pipe bed which was reasonably fit for its intended purpose and in a place of work which was safe, and in not providing the necessary information for the construction of a pipe bed which as constructed was reasonably fit for its intended purpose.

III

The fact that the decision in this case was rendered in a longshoreman's case does not mean that it affects only longshoremen's rights under the warranty of seaworthiness. The same principles have been applied in seamen's cases and will continue to be so applied. The decision below severely restricts the very rights which were accorded sea-

men under the warranty of seaworthiness in cases such as *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 (1944) and *Waldron* v. *Moore McCormack Lines*, 386 U.S. 724 (1967). If the decision below is followed, seamen no longer will be protected by the warranty of seaworthiness for misuse of seaworthy equipment unless they establish negligence.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

VICTOR S. CICHANOWICZ
Counsel for Petitioner
80 Broad Street
New York, New York 10004

JOHN P. SCHAFFER,
Of Counsel